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No. 80-1699

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

DR. INGRE RUDOLPH PLANTE, *et al.*,
Petitioners,
v.
ALLEN BODINE SCOTT, by and through his Guardian,
MICHAEL J. WEINTRAUB,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE AND MEMORANDUM OF THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE

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MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE

Pursuant to Rule 36.1 of the Rules of this Court, the American Psychiatric Association ("APA") submits this motion to file a memorandum as *amicus curiae*. Petitioners have consented to the filing of this brief; * respondent has refused consent.

As noted in "Interest of Amicus Curiae," the APA has participated in numerous cases involving mental

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* A copy of the letter consenting to the filing is being lodged with the Clerk of this Court.

health issues. See *Youngberg* v. *Romeo*, No. 80-1429, cert. granted, May 18, 1981; *Pennhurst State School and Hospital* v. *Halderman*, Nos. 79-1404, 79-1408, 79-1414, 79-1415, and 79-1489, decided April 20, 1981; *Parham* v. *J.R.*, 442 U.S. 584 (1979); *Addington* v. *Texas*, 441 U.S. 418 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). These cases have presented troublesome questions regarding the extent of state obligations towards the mentally-ill (*O'Connor; Addington; Parham*) and the mentally-retarded (*Pennhurst; Youngberg*). In its submissions, the APA has sought to assist the Court in developing legal doctrines that promote, rather than hinder, efforts to improve the quality of care and treatment for the mentally-ill and mentally-retarded. This Court recently granted the APA permission to file an *amicus* memorandum in *Youngberg* v. *Romeo*, *supra*.

The decision of the Third Circuit in the present case, like the decision in *Youngberg* v. *Romeo*, authorizes a substantial intrusion by the federal courts into medical decisions. Again, the court has indicated that certain forms of treatment may be permitted only if shown to be the least restrictive form of treatment available, even though they may be the most desirable methods of treatment from a medical standpoint. The court has also said that state officials must determine whether the facility to which a resident is committed is the least restrictive facility available under the circumstances. Like the decision in *Youngberg* v. *Romeo*, the decision below carries the implication that doctors and employees are subject to damages for institutional inadequacies that they cannot correct, a doctrine that could severely limit the ability of state hospitals to attract and retain qualified staff members. The APA believes that it can supply particular insight, not fully provided by the parties, into the practical and medical realities inherent in the care and treatment of the mentally-ill.

The development of constitutional standards for care of the mentally-ill and mentally-retarded involves a complex balancing process in which medical issues necessarily play a prominent role. Psychiatrists have major responsibility in the development of programs for both the mentally-ill and the mentally-retarded, and many psychiatrists are employed at state and local facilities. The APA believes, therefore, that this Court will benefit from its views as well as the views of advocates for the mentally-ill and of state officials.

It is therefore respectfully submitted that this motion to file a memorandum as *amicus curiae* should be granted.

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY	2
ARGUMENT	4
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

Addington v. *Texas*, 441 U.S. 418 (1979)	2
Edelman v. *Jordan*, 415 U.S. 651 (1974)	7
O'Connor v. *Donaldson*, 422 U.S. 563 (1975)	2
Parham v. *J.R.*, 442 U.S. 584 (1979)	2
Parratt v. *Taylor*, No. 79-1734, decided May 18, 1981, 49 U.S.L.W. 4509	7
Pennhurst State School and Hospital v. *Halderman*, Nos. 79-1404, 79-1408, 79-1414, 79-1415, and 79-1489, decided April 20, 1981	2
Youngberg v. *Romeo*, No. 80-1429, cert. granted, May 18, 1981	*passim*

Constitutional Provision

United States Constitution Amendment XIV	*passim*

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MEMORANDUM OF THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American Psychiatric Association ("APA") was founded in 1844 and is the Nation's largest organization of qualified doctors of medicine specializing in psychiatry. Twenty-six thousand of the Nation's approximately 33,000 psychiatrists are members. Psychiatrists bear a major responsibility for evaluating, developing programs for, and caring for the mentally-ill and the mentally-retarded.

The APA has previously participated as *amicus curiae* in numerous cases involving mental health issues. See *Youngberg* v. *Romeo*, No. 80-1429, cert. granted, May 18,

1981; *Pennhurst State School and Hospital* v. *Halderman*, Nos. 79-1404, 79-1408, 79-1414, 79-1415, and 79-1489, decided April 20, 1981; *Parham* v. *J.R.*, 442 U.S. 584 (1979); *Addington* v. *Texas*, 441 U.S. 418 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). The present case involves significant issues regarding care of, and responsibility for, the mentally-ill, including the establishment of constitutional standards for confinement and treatment and the likely imposition of personal liability on individuals unable to correct institutional inadequacies. The APA believes that its clinical experience and insight concerning the mentally-ill can assist the Court in addressing the important issues in this case.

INTRODUCTION AND SUMMARY

This case, like *Youngberg* v. *Romeo*, No. 80-1429, cert. granted, May 18, 1981, presents important issues regarding constitutional standards for the operation of state institutions and individual responsibility for failure to meet those standards. Relying heavily on its decision in *Youngberg* v. *Romeo*, the Third Circuit has held that, in providing care and treatment for a mentally-ill person, "hospital officials [must] have considered the existing alternative residences and found that no less restrictive setting would be sufficient to secure adequate protection from threatened harm." Pet. App. 31a. The court has also held that the constitutional standards adopted in *Romeo* for treatment for the mentally-retarded, apparently including a requirement of the least restrictive treatment available whenever significant deprivations of liberty are involved, are "equally applicable to the involuntarily committed mentally ill." Pet. App. 16a-17a. Finally, the court has made clear that individual state employees can be held personally liable for failure to satisfy the standards, perhaps in punitive as well as compensatory damages, even though the core of the problem is inadequate

funding over which they have no control. Pet. App. 36a-44a.

These issues merit the attention of this Court. As we have previously indicated in our *Romeo* memorandum,[1] the constitutional standard of least restrictive treatment (or least restrictive setting) is too inflexible and perhaps unworkable. Although the APA believes that the Constitution prohibits the states from simply neglecting the physical and medical needs of persons involuntarily committed to their care, the analysis imposed by the Third Circuit requires courts not just to determine whether basic, decent standards of care and treatment are being met, but to make refined judgments about whether a particular form of care and treatment is the least restrictive or most desirable under the circumstances. This approach carries principles of substantive due process too far, putting federal courts in the position of reallocating resources and making professional decisions without any real constitutional basis or limit. We are also concerned about the willingness of the Third Circuit to endorse personal liability for institutional problems. The definition of the constitutional tort itself, or of the good-faith immunity defense, should accommodate the fact that individual state employees by themselves typically cannot change the conditions giving rise to the complaint.

These issues are very similar to the issues presented in *Youngberg* v. *Romeo*, *supra*. In our view, the Court would benefit from considering questions relating to the mentally-ill and the mentally-retarded at the same time. We submit, therefore, that this Court should grant the present petition and consolidate this case with *Youngberg* v. *Romeo*.

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[1] For the convenience of the Court, we are lodging additional copies of our memorandum in *Romeo* with the Clerk.

ARGUMENT

As the Third Circuit recognizes in its opinion, the questions presented in this case are closely aligned with the issues presented in *Youngberg* v. *Romeo*, No. 80-1429, cert. granted, May 18, 1981. We have summarized our views on these issues in the *amicus* memorandum filed in *Youngberg* v. *Romeo*, and we will not repeat them at length here. We add only a few brief remarks pertaining directly to this case.

1. The court below apparently has required states to provide mentally-ill persons involuntarily committed to institutions with care in the least restrictive setting available. Having described the awful conditions at the Vroom facility, the court specifically ordered an inquiry into "whether [respondent] could be housed in surroundings less restrictive of his personal liberty," Pet. App. 26a, noting that "[c]ourts have not limited 'least restrictive' analysis to a choice between outpatient services and institutionalization." Pet. App. 26a n. 9.[2] The court then found an analogy between conditions at Vroom, with its "severe restrictions on movement and deprivations of sanitary, healthful conditions," and the shackling at issue in *Youngberg* v. *Romeo*, indicating that either can be "justified only by a 'compelling necessity' or by showing that it was 'the least restrictive method of dealing with

[2] The court addresses the same issue at several other points in the opinion. Pet. App. 27a ("hospital was required to demonstrate that it had considered alternative security accommodations for [respondent] and to explain why it had found them inadequate") and Pet. App. 31a ("hospital officials [must] have considered the existing alternative residences and found that no less restrictive setting would be sufficient to secure adequate protection from threatened harm.") It is not clear whether the reference to "existing" residences is intended to suggest that the states' obligation stops short of constructing new, less restrictive facilities. If new facilities are not required, then the existence of a personal right to the least restrictive environment would seem determinable only a first-come, first-served basis.

the patient in light of his problems and the surrounding environment.'" Pet. App. 28a.

The court also seems to declare that certain forms of treatment must be the least restrictive available. In *Youngberg* v. *Romeo*, the court ordered that any treatment decision involving "significant deprivations of liberty" be allowed only if it "provided for the least instrusive treatment available under the circumstances." *Youngberg* Pet. App. 47a.[3] Although that case involved only the mentally retarded, the court in this case concluded that "the analysis of [*Youngberg* v. *Romeo*] is for fourteenth amendment purposes equally applicable to the involuntarily committed mentally ill." Pet. App. 17a.[4]

In our view, the emphasis on least restrictive conditions and least restrictive treatment, while serving to tie the decisions below to some recognized precept of due process law, is ultimately confusing and unsound. The degree of restrictions placed on a mentally-ill or mentally-retarded resident cannot be isolated from professional decisions about the proper course of treatment and, in the end, the most desirable allocation of resources among competing ends. As a practical matter, it is not at all clear that the notion of least restrictive treatment provides any useful guidance to those entrusted with care of the mentally-ill or mentally-retarded; it is more likely, in fact, that it provokes a sense of uncertainty and risk-aversion that may impede effective treatment. Nor is it clear that, once states have corrected the intolerable conditions existing at some institutions, the population of mentally-ill and mentally-retarded is best served by an additional constitutional requirement that the states pro-

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[3] Other treatments must be shown to be "acceptable in light of present medical or other scientific knowledge." *Youngberg* Pet. App. 47a.

[4] The court below, in quoting from the charge approved in the *Romeo* decision, omitted the subsection dealing with least restrictive treatment. Pet. App. 17a n.6. The omission is not explained.

vide the least restrictive environment for those whom it chooses to treat. To lock those views into place, as a matter of constitutional law, is an unnecessary limitation on professional judgment.

As we said in our *Romeo* memorandum, it also seems anomalous that the provision of acceptable medical treatment or decent housing and care nevertheless can offend the liberty interests of institutionalized persons. It seems more reasonable to recognize that a broad range of permissible treatment and restriction, left largely to the professional discretion of the staff, is inherent in the original commitment to a state facility. In our view, that range is not, and should not be, so broad as to encompass unsanitary conditions, gross deprivations of food and clothing, or the absence of meaningful treatment or habilitation efforts. However awkwardly the principles of substantive due process may apply, it is right to declare that the states, having taken persons involuntary into their custody because of a mental condition, cannot then simply ignore either the wellbeing of the persons themselves or the conditions giving rise to their commitment. But it is a very different matter to say that due process forces the states to choose between providing the least restrictive care and treatment or no care and treatment at all. In our view, the proper constitutional standard lies somewhere in between.

2. The court below also carries forward the notion, evidenced in *Youngberg* v. *Romeo* as well, that individual employees may be held liable for institutional deficiencies even though they have no real power to correct them. We continue to believe that the definition of a constitutional tort, or the defense of good-faith immunity, must be flexible enough to prevent the imposition of liability on persons without fault. *Youngberg* Mem. 12-15. At present, this seems not to be the case.

The Third Circuit tackles the issue somewhat obliquely, suggesting that the fault of the defendants in this case

lies in their failure to move respondent from conditions known to be intolerable. Even leaving aside the fact that the state courts refused to require a move, it seems evident that the fault as defined by the court of appeals is somewhat illusory. Whatever petitioners might have done for respondent, there is little in his theory of the case that distinguishes him from many other residents of Vroom or, in some respects at least, from other mentally-ill persons institutionalized in New Jersey. Petitioners could not have moved *everyone* in the same situation, or provided them with additional treatment, without rapidly exhausting the inadequate resources made available to them. It would be short-sighted, therefore, to hold them liable in damages for what amounts a claim of inadequate favoritism. The root of the problem lies with the state legislatures, not with the individuals carrying out their programs. *See Parratt* v. *Taylor*, No. 79-1734, decided May 18, 1981, 49 U.S.L.W. 4509, 4515 n. 8 (Powell, J., concurring in the judgment).

To impose personal liability for institutional defects thus leads to an unfair result.[5] Although many states presumably indemnify their employees, the decision to do so is wholly at the discretion of the states. At best, therefore, the states merely deflect a bullet aimed at the wrong target. Moreover, the fairness of the personal liability doctrine then depends, in fact if not in law, upon an end run around the Eleventh Amendment. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974). It seems preferable to face the problem directly, rather than to avoid it by this haphazard process.

3. We believe that prompt review of these issues is appropriate, particularly in light of the grant of cer-

[5] We do not question that some suits may involve the deliberate, affirmative denial of rights to institutional residents. Those cases are a different matter. The discussion in this section pertains only to suits based on systemic deficiencies, usually arising out of inadequate funding.

tiorari in *Youngberg* v. *Romeo*. Employees in the Third Circuit must now work in the wake of decisions which, taken together, require compelling reasons for shackling and functional equivalents, a showing that shackling or chosen places of confinement are the least restrictive forms of care available, proof of substantial necessity for failure to prevent injuries, a showing that treatment generally meets accepted medical standards, and, finally, a showing that some treatments are the least restrictive possible even though they may be otherwise acceptable. These complex standards, somehow divined from the sparse language of the Due Process Clause, are hard to understand and hard to follow. Yet, employees in the Third Circuit must apply them in the face of inadequate funding and at the risk of personal liability. A grant of certiorari in this case will allow the Court to consider these issues in their entirety.

We also suggest that the Court will benefit from addressing the problems of the mentally-ill and the mentally-retarded together. Although there are differences between the two populations, their problems with inadequate care and inadequate treatment or habilitation have significant overlap. Moreover, in a world of limited resources, the mentally-ill and mentally-retarded necessarily tend to compete for state funds. To the extent that their constitutional claims on such funds are identical, it makes sense to define those claims at the same time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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